152 U.S. 577

RECORD, CASE NO. 14361.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 315.

DAVID S. PRESSON, COLLECTOR OF CUSTOMS FOR THE PORT OF GLOUCESTER, PLAINTIFF IN ERROR,

vs.

EDWARD T. RUSSELL AND CLARENCE B. MITCHELL, COPARTNERS AS EDWARD T. RUSSELL AND COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 20, 1890.

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1 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Edward T. Russell and Clarence B. Mitchell, merchants and copartners doing business in Boston, in said district, under the name and style of Edward T. Russell and Company, plaintiffs, and David S. Presson, collector of customs for the port of Gloucester, defendant, in an action of contract a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the thirteenth day of June, in the year of our Lord one thousand eight hundred and ninety.

[SEAL.] JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by

LE BARON B. COLT,
U. S. Circuit Judge.

2 *Return on writ of error.*

Circuit court of the United States, district of Massachusetts, ss.

And now, here, the judges of the circuit court of the United States, in and for the district of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States, in and for the district of Massachusetts, have hereto set my hand and the seal of said court this first day of October, A.D. 1890.

[SEAL.] JOHN G. STETSON,
Clerk.

3 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Thursday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and ninety.

Before the honorable Le Baron B. Colt, circuit judge.

EDWARD T. RUSSELL AND CLARENCE B. Mitchell, merchants and copartners, doing business in Boston, in said district under the name and style of Edward T. Russell and Company, plaintiffs,
v.
DAVID S. PRESSON, COLLECTOR OF CUSTOMS for the port of Gloucester, defendant, in an action of contract: Ad damnum, $300.
} No. 3015, law docket.

4 *Plaintiffs' declaration.*

And the plaintiffs say that heretofore, to wit, on the nineteenth day of January, in the year eighteen hundred and eighty-eight, they imported into the port of St. Albans, within the revenue district of Vermont, from Montreal, in the Dominion of Canada, via the Central Vermont Railroad, numbered 2884, certain goods, wares, and merchandise, to wit: Certain dry salted codfish in barrels, to wit, one hundred barrels containing twenty-three thousand eight hundred pounds of dry salted codfish; that the date of the invoice of said codfish is the seventeenth day of January, A. D. 1888; that the date of the entry of said codfish at the custom-house at St. Albans aforesaid is the nineteenth day of January, A. D. 1888; that said goods, wares, and merchandise were entered at St. Albans aforesaid by John S. Story, agent of said Central Vermont Railroad Company, and were transported in bond to the port of Gloucester, in the revenue district of Gloucester; that said goods, wares, and merchandise were entered for rewarehouse and withdrawal for consumption at the custom-house at Gloucester aforesaid on the twenty-sixth day of January, A. D. 1888; that said goods, wares, and merchandise were, upon being imported as aforesaid, subject by law to the payment to the United States of no duty whatsoever and were free; yet the said defendant, then and now collector of customs at the said port of Gloucester, under color of a law of the said United States for the collection of duties on imports, assessed, as
5 and for customs duties upon said codfish the sum of two hundred and thirty-eight dollars, to the payment of which as and for customs duties the said codfish was not by law subject as aforesaid; and the plaintiffs, on the twenty-fifth day of January, 1888, appealed from said assessment to the Secretary of the Treasury, and afterwards, to wit, on the seventeenth day of February, 1888, received from J. G. Maegregor, chief of the division of customs, a communication, dated the fifteenth day of , 18 , addressed to said plaintiffs, and informing them that the case had been disposed of by instructions to the collector of customs

at the port of Burlington; and the said defendant demanded, exacted, and received from the plaintiffs, as and for customs duties upon said dry salted codfish, the full amount assessed by him as aforesaid, being two hundred and thirty-eight dollars; and on the twenty-sixth day of January, 1888, the plaintiffs, for the purpose of obtaining possession of said codfish, and under protest, filed against the exaction thereof on the twenty-fifth day of January, 1888, paid the said sum so assessed by the defendant, as aforesaid; and the defendant owes the plaintiffs said sum of two hundred and thirty-eight dollars, with interest thereon from the said twenty-sixth day of January, A. D. 1888.

Second count. And the plaintiffs say the defendant owes them two hundred and thirty-eight dollars, with interest thereon, according to the bill of particulars hereunto annexed, for money received by the defendant to the use of the plaintiffs.

By FREDERIC CUNNINGHAM,
Their Attorney.

6 *Bill of particulars.*

David S. Presson to Edward T. Russell & Co. Dr.:

For money exacted and paid under protest as and for customs duties on dry salted codfish imported into the port of Gloucester in excess of the amounts to which the same was by law subject on importation, as follows, to wit:

Item 1. 1888, Jan. 26th. On 23,800 lbs. in 100 barrels $238.00
" 2. Interest on same .....

7 The writ in this cause is dated the thirteenth day of March, A. D. 1888, and was duly entered at the May term of this court, A. D. 1888, when and where the parties appeared by their respective attorneys.

This cause was thence continued to the October term, A. D. 1888, when the following agreed statement of facts was filed:

Agreed statement of facts.

(Filed April 1, 1889.)

It is agreed that the material facts in this case are as follows:

The plaintiffs, on the nineteenth day of January, 1888, imported from Montreal, Can., into the port of St. Albans, Vt., one hundred barrels of dry salted codfish consigned to John S. Story, to be by him entered at the custom-house at St. Albans, and thence to be immediately transported in bond to the port of Gloucester, Mass., consigned to the plaintiffs. The goods were entered at the custom-house at St. Albans on the nineteenth day of January, 1888, by Story, as "one hundred barrels pickled cod," and were immediately transported in bond to Gloucester and entered by the plaintiffs at the custom-house in Gloucester. The fish were imported in dry flour or sugar barrels, incapable of containing liquids, and had never been pickled, but had been cured with dry salt, and were not at the time of their importation what is known as "pickled fish," but were dry salted fish; each barrel contained two hundred and thirty-eight pounds of fish. The defendant, then collector of customs for said port of Gloucester, demanded and collected upon each pound of said fish a duty of one cent,

amounting in the whole to the sum of two hundred and thirty-eight dollars, a sum which the plaintiffs claimed was not due and payable as duties, and exacted payment of the same from the plaintiffs, who made payment thereof to the said defendant under protest and in order to obtain possession of said merchandise.

8 The plaintiffs, being dissatisfied with the decision of the collector assessing the said duty upon the said fish, gave to him due and seasonable notice thereof in writing, setting forth therein distinctly and specifically the grounds of their objection thereto, and duly and seasonably appealed to the Secretary of the Treasury, who affirmed the said decision of the said collector, and the plaintiffs seasonably brought this suit to recover the said sum of one hundred and nineteen dollars, so exacted and paid to the said defendant for customs duty upon said fish.

The writ and pleadings may be referred to, also annexed copy of protest, and copy of invoice also annexed.

Upon the foregoing facts it is agreed that the court may enter such judgment as the law requires.

FREDERIC CUNNINGHAM,
Attorney for Plaintiffs.

T. H. TALBOT,
Assistant United States Attorney, for Defendant.

Copy of protest annexed.

BOSTON, *Jan.* 25, 1888.

COLLECTOR OF CUSTOMS,
St. Albans, Vt.:

SIR: There was entered at your port on or about the 20th inst., marked "I," 100 bbls. salted codfish from Montreal, by the Central Vermont R. R. G. T., car 2884, consigned to order of shippers at Gloucester, Mass.

The goods above named were purchased by us and arrived in Gloucester yesterday "in bond."

We understand that you have assessed duties at the rate of one cent per lb. as "pickled fish," whereas they are "dry fish," and the duty should be but one-half cent per lb.

We hereby protest against your assessment of one cent per lb., and shall hold you and the Government responsible for the unlawful excess of duty.

Yours, truly,

EDW'D T. RUSSELL & CO.

9 *Copy of invoice.*

[Invoice of codfish to be transported on the C. V. R. to the custom-house at St. Albans, consigned to Jno. S. Story, to be by him entered there, and thence to be transported to Gloucester, Mass., consigned to E. T. Russell & Co.]

Marks and Nos.	Quantity.	Description of goods.	When purchased.	Where purchased.	Actual cost coin.	Consular correction.
◇I◇	100	Bbls. codfish ... 238 lbs. ea. 23,800 lbs. at 4.40 per 200 lbs.	Jan. 17/88...	Montreal ...	523.60	

For immediate transportation in bond to Gloucester, Mass., via St. Albans.

MAGOR BROS. & CO.
per J. MAGOR.

This cause thereupon came on to be heard and was fully heard by the court, and was then continued under advisement to this present term, and now, to wit, April 12, 1890, it is considered by the court that the said Edward T. Russell and Clarence B. Mitchell, plaintiffs, recover of the said David S. Presson, defendant, the sum of two hundred and thirty-eight dollars ($238) damages and their costs of suit taxed at twenty-seven dollars and eighty-four cents ($27.84).

A true record:

Attest:

JOHN E. STETSON,
Clerk.

10 The following is the rescript of the court in accordance with which judgment was entered in favor of the plaintiffs:

Circuit court of the United States, district of Massachusetts.

EDWARD T. RUSSELL ET AL.
v.
DAVID S. PRESSON. } No. 3015, Law Docket.

Rescript. (*Filed Apr.* 11, 1890.)

COLT, *J.*:

The importation in this case was salted fish in barrels, and therefore not subject to duty under the statute (22 Stat., 503). The protest was sufficient. It expressed dissatisfaction at the rate of duty of one per cent per pound which was assessed. The fact that the protest also stated that the rate of duty should be one-half of one per cent per pound should not bind the importer to pay a duty at that rate. If the importer has duly protested under Sec. 2931, Rev. Stat., then the rate of duty to be assessed is not what the importer may think is proper, but the legal rate under the statute. In this case, judgment should be entered for the plaintiffs for $238.00 and costs.

11 Circuit court of the United States, district of Massachusetts.

EDWARD T. RUSSELL ET AL.
v.
DAVID S. PRESSON. } No. 3015, Law Docket.

Assignment of errors.

Assignment of errors under writ of error sued out from the Supreme Court of the United States.

And for assignment of errors the plaintiffs in error say that the facts found in said entitled case are not sufficient in law to sustain the judgment therein rendered.

FRANK D. ALLEN,
U. S. Attorney.

12 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record of said circuit court in the cause entitled,

EDWARD T. RUSSELL ET AL., PLAINTIFFS,
v.
DAVID S. PRESSON, DEFENDANT. } No. 3015, Law Docket.

lately determined in said circuit court, and of all proceedings therein, and of the rescript of the court and assignment of errors filed therein.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this first day of October, in the year of our Lord one thousand eight hundred and ninety, and of the independence of the United States the one hundred and fifteenth.

[SEAL.] JOHN G. STETSON,
Clerk.

(Indorsed on cover:) No. 315. David S. Presson, collector of customs for the port of Gloucester, plaintiff in error, *vs.* Edward T. Russell and Clarence B. Mitchell, copartners as Edward T. Russell & Company. 14361. Massachusetts C. C. U. S. Filed October 20, 1890.

Office Supreme Court U. S.
FILED.
MAR 19 1894
JAMES H. McKENNEY,
CLERK.

Case No. 14361.

In the Supreme Court of the United States

OCTOBER TERM, 1893.

DAVID S. PRESSON, COLLECTOR FOR the port of Gloucester, plaintiff in error,
v.
EDWARD T. RUSSELL ET AL. } No. 315.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR.

Case No. 14361.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

DAVID S. PRESSON, COLLECTOR FOR the port of Gloucester, plaintiff in error,
v.
EDWARD T. RUSSELL, ET AL.
No. 315.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR.

This was an action to recover duties paid in 1888. The case, therefore, is governed by the tariff law of 1883. No answer seems to have been filed to plaintiffs' declaration, but an agreed statement of facts was submitted and a judgment entered thereon in favor of plaintiffs for double the amount claimed by them in said agreed statement. The case was tried by Judge Colt, without a jury.

STATEMENT OF FACTS.

The goods imported were "dry salted codfish;" they were entered at the custom-house as "pickled codfish." They are described as follows:

> The fish were imported in dry flour or sugar barrels, incapable of containing liquids, and had never been pickled; but had been cured with dry salt, and were not at the time of their importation what is known as "pickled fish," but were dry salted fish.

Duty was collected at the rate of 1 cent per pound, amounting to $238. Plaintiffs filed a protest specifying their objection as follows:

> We understand that you have assessed duties at the rate of 1 cent per pound as "pickled fish," whereas they are "dry fish," and the duty should be but one-half cent per pound. We hereby protest against your assessment of 1 cent per pound, and shall hold you and the Government responsible, etc.

The actual cost of the fish, in coin, was stated in the invoice at $523.60. The actual market value is not given.

The Secretary of the Treasury having affirmed the decision of the collector, the plaintiffs "seasonably brought their suit to recover the said sum of $119;" that is, the difference between one-half cent and 1 cent per pound.

All of the above facts are stated in the agreed statement, which ends with the following sentence:

Upon the foregoing facts it is agreed that the court may enter such judgment as the law requires.

ASSIGNMENT OF ERRORS.

We assign for error the awarding of judgment for the plaintiffs, and further, in particular, the awarding of such judgment for double the amount claimed in the agreed statement of facts.

ARGUMENT.

I.

While no answer seems to have been filed, it seems probable that an answer was served upon the plaintiffs, as the agreed statement of facts refers to "pleadings" in the plural. However this may be, it was in the power of the parties to waive answer altogether, and they did so by making and filing their agreed statement of facts, and agreeing therein that the court might enter such judgment as the law required. Lack of a pleading is not a jurisdictional defect. (*Lober* v. *Cooper*, 7 Wall., 565.)

II.

Whichever of the paragraphs hereinafter referred to may be the one which properly applies to the present importation of fish, Judge Colt is certainly mistaken in holding them to be on the free list. He says (opinion, p. 5):

> The importation in this case was salted fish in barrels, and therefore not subject to duty under the Statute (22 Stat., 503).

His reference is not to the free list, but to the page of the statute book which includes the rates of duty on the various kinds and preparations of fish specifically men-

tioned in the tariff act. His argument seems to be that the fish now under consideration are not anywhere specifically enumerated as liable to duty, and therefore must be on the free list. The learned judge seems to have overlooked the provisions of §2513 of the Revised Statutes as amended by the tariff act of 1883, which provides rates of duty for all articles not enumerated in the act, either as subject to a specified duty or as subject to no duty at all. It is therefore clear that the decision must be either reversed or modified.

III.

It is not necessary, however, to fall back upon the provisions of § 2513.

If the fish are not dutiable, either directly or by similitude, under either the pickled-fish clause relied upon by the collector, or the dry-fish clause relied upon by the importers, then it is submitted that they are "fish prepared or preserved, * * * not specially enumerated or provided for" under paragraph 283, and dutiable at 25% *ad valorem*. This paragraph seems intended to cover all fish or preparations of fish not elsewhere more specifically named.

IV.

The fish were entered as "pickled cod." They were in barrels. For this reason, doubtless, the collector assessed them under paragraph 279 as follows:

> Salmon, pickled, 1 cent per pound; other fish, pickled in barrels, 1 cent per pound.

It is now stipulated that the fish are not pickled. It may, nevertheless, be suggested that they are sufficiently similar to come under the same rating by virtue of the similitude clause of § 2499.

Certainly, being in barrels, they are not within paragraph 280, relied upon by the importers in their protest, which paragraph is as follows:

> Foreign caught fish, *imported otherwise than in barrels or half barrels*, whether fresh, smoked, dried, salted, or pickled, not specially enumerated or provided for in this act, 50 cents per hundred pounds.

Nor can the similitude clause be applied to this paragraph so as to admit fish "imported * * * in barrels or half barrels" at the same rating. That would practically nullify a vital qualification evidently inserted with deliberation. The paragraph is certainly not applicable to fish imported in barrels or half barrels and also to fish "imported otherwise than in barrels or half barrels." (*Arthur* v. *Hermann*, 96 U. S., 141, 142.)

V.

If, therefore, the collector's rating is not properly applicable by means of the similitude clause, the case comes within paragraph 283, and the codfish are to be regarded as prepared or preserved. This paragraph lays an *ad valorem* duty. It cannot be availed of by the importers to save any part of the sum awarded to them by the present judgment. Two considerations prevent this.

(1) The protest is not sufficient. §§ 2931 and 3011 of the Revised Statutes require that it should be specific. It is specific, but it specifies only one objection to the collector's action. It claims that the fish are not dutiable at 1 cent per pound, because "they are 'dry fish,' and the duty should be but one-half cent per pound." It does not even deny that they were pickled fish. It might be used to support a contention that, being both pickled and dry, the latter clause should govern. *Non constat* that pickled fish may not be taken out of the brine and dried; that they can not be "dry" as well as "pickled."

The protest is therefore clearly insufficient under the authorities: (*Davies* v. *Arthur*, 13 Blatchf., 34; 96 U. S., 148; *Heinze* v. *Arthur's* Executors, 144 U. S., 28; *Chung Yune* v. *Kelly*, 8 Sawy., 415; *In re Austin*, 47 Fed. Rep., 873; *In re Collector of Customs*, 55 Fed. Rep., 276.) These authorities, with others bearing upon the same point, are set forth at length in the brief filed for defendant in error in *Herrman* v. *Robertson*, No. 280 of this term, at pp. 6-15, to which brief we respectfully beg leave to refer.

As there argued, it is of the highest importance that the rule be enforced requiring the importer to make his objection clear within a short time after the liquidation of duty. If he specifies the correct rate of duty, the presumption is that the collector will make his ruling conformable. If he specifies the wrong rate of duty, the collector can not be expected to search through the statutes and find whether there may be some further applicable clauses hidden away. Moreover, it is presumable that

each importation is but one of many subject to the same classification. If the collector is classifying mistakenly, merchants whose attention is called to the question should set him straight at once. To allow them, years afterwards, to come in and call attention to some section that has escaped everybody's attention at the time might derange Treasury calculations to the extent of millions of dollars.

This is a good illustration. The plaintiffs import these fish, telling the collector that they are pickled fish in barrels. The collector classifies them as such. The importers then say: "We were mistaken. They were not pickled. They were cured with dry salt. They are, therefore, dutiable at a half cent per pound." The collector answers: "The half cent duty cannot apply because they are imported in barrels." Can the importers turn up two years later and say: "We misled you at the time, but we are entitled to just about the same amount we claimed, for they are prepared fish not otherwise provided for in the statute?" This is substantially asking to recover for a mutual mistake of law induced by themselves.

(2) There is no finding as to the value of the fish. The invoice annexed to the agreed statement does, indeed, purport to give the cost of the fish. Even this is not stated to be correct, and cost is not the equivalent of market value. It may be low from special circumstances, or because the purchase is at an out-of-the-way place. *Ad valorem* duties are levied at "the true market value of

merchandise in the principal markets of the country from whence exported, at the date of exportation." (Revised Statutes, § 2952.) Upon this record, therefore, if the proper duty is *ad valorem*, it is necessary to direct a new trial. (*Saltonstall* v. *Birtwell*, 150 U. S., 417.)

Respectfully submitted.

EDWARD B. WHITNEY,
Assistant Attorney-General.

Office Supreme Court U. S.
FILED.
MAR 19 1894
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

Record Case, No. 14361. Term No 315.

DAVID L. PRESSON,

COLLECTOR OF CUSTOMS FOR THE PORT OF GLOUCESTER,

PLAINTIFF IN ERROR.

v.

EDWARD T. RUSSELL AND CLARENCE B. MITCHELL,

COPARTNERS AS

EDWARD T. RUSSELL & COMPANY,

DEFENDANTS IN ERROR.

BRIEF FOR THE DEFENDANTS IN ERROR.

FREDERIC CUNNINGHAM,
Counsel for Defendants in Error.

Supreme Court of the United States.

OCTOBER TERM, 1893.

Record Case. No. 14361. Term No. 315.

DAVID L. PRESSON, *Collector of Customs for the Port of Gloucester, Plaintiff in Error,*

v.

EDWARD T. RUSSELL AND CLARENCE B. MITCHELL, *Copartners as* EDWARD T. RUSSELL AND COMPANY, *Defendants in Error.*

BRIEF FOR THE DEFENDANTS IN ERROR

ASSESSMENT OF DUTIES.

The Tariff Act in force at the time of the importation in this case was Act of Congress, March 3, 1883 (22 U. S. Stats. at large, 504), and if the fish were liable to duty at all they were so liable under Schedule G of the above act. Duties were levied upon them at the rate of one cent per pound, and it is evident by an inspection of said Schedule G, that the only clause under which these duties could have been levied at that rate is contained in the thirty-first line of the schedule as follows: "Other fish, pickled, in barrels, one cent per pound." By the statement of facts it clearly appears that these fish were *not pickled*, and never had been.

It is evident at once, therefore, that the duties were wrongfully exacted, and protest and appeal having been duly taken, the plaintiffs are entitled to recover.

To what duties then were these fish subject?

The plaintiffs claim that there is no provision of law under which these goods were liable to any duty whatsoever.

These were salted fish (dry), and the only provision relating to salted fish in the above act is in the thirty-third line of schedule G as follows: "Foreign-caught fish imported *otherwise than in barrels*

or half barrels, whether fresh, smoked, dried, salted or pickled, not specially enumerated or provided for in this act, fifty cents per hundred pounds."

From this it is evident that, unless specially enumerated elsewhere in this act, all fresh, smoked, dried or salted fish which *are* imported *in barrels or half barrels* are intentionally excluded by Congress from the provisions of this act.

Pickled fish in barrels (see line 31) are subject to one cent per pound.

Pickled fish *not* in barrels or half barrels (see line 34) are subject to one half cent a pound.

It is evident that Congress drew a distinction between pickled fish and fresh, smoked, dried and salted fish, for it provided duties upon pickled fish whether in barrels or not, but made fresh, smoked, dried and salted fish subject to duties only when imported *not* in barrels or half barrels. If salted fish imported in barrels are to be held subject to duty under the clause above quoted beginning, "Foreign-caught fish," etc., then the words in said clause, "Imported otherwise than in barrels or half barrels," are nugatory, and might as well have been left out.

Such a construction is not admissible upon any of the well-known principles of the construction of statutes.

This court certainly cannot at this stage of the case find, as a fact, that the fish imported in this case were "fish prepared or preserved" within the meaning of line 46 of Schedule G. The statement of facts states that they were "dry salted fish," which is a different thing and subject under the Tariff Act to a different duty from "preserved or prepared fish." After judgment in the Court below, it must be assumed conclusively that the Court found that these were not "prepared or preserved fish."

Moreover, it is apparent from the decisions of the courts and of the Treasury Department that the term "prepared or preserved fish" does not include salted or pickled fish, but means fish prepared with something more than brine or vinegar, prepared with vegetables, spices or something of that sort.

Hansen *v.* Robertson, 29 Fed. Rep. 686.

Synopsis of Treasury Decisions, Nos. 8,253, 8,319.

It appears by the statement of facts, Rec., page 3 at bottom, that these were not even pickled fish, much less "prepared or preserved fish."

The similitude section of the above act (Sect. 2,499) does not apply, because Congress could not have intended that the *very same article* (salted fish) upon which duties are laid when imported *otherwise than in barrels* should be taxed as a *similar* article when imported *in barrels*.

In the absence of any statute laying a duty, the goods are free.

"The Liverpool Hero," 2 Gallison, 188.

Adams *v.* Bancroft, 3 Sumner, 387 (as to strict construction of revenue laws).

U. S. *v.* Wigglesworth, 2 Story, 373, 374.

PROTEST.

The defendants in error are not precluded from claiming that the goods are free, by the form of their protest, that is to say, because it states that "the duty should be but one half cent per pound."

Rev. Stats. 2,931 and 3,011 as amended by the Act of Feb. 27, 1877 (19 Stats. at large, 247.)

The importer is not bound to state what the duty *should* be: that is surplusage. When he states that he protests against an assessment of duties upon goods as "pickled fish," and claims that they are "dry fish," that is sufficient; it then becomes a question of law what the proper duties are, it being conceded that they are "dry fish"; and the collector is sufficiently warned of the question at issue.

The protest would have been sufficient if it had merely stated that the importer protested against an assessment of duty upon the goods classified as pickled fish, and claimed that they were dry fish, without stating at all what the rate of duty assessed was or what it should be.

The protest states (Rec., page 4), that the goods have been classified as pickled fish and a duty of one cent per pound has been

exacted upon them as such, and that they should have been classified as dry fish; the fact that it goes further and makes a superfluous statement that the duty should be one half cent per pound could not mislead the collector when his attention was called to the wrongful classification and to the amount exacted upon such wrongful classification.

Arthur v. *Morgan*, 112 U. S. 501.
Schell's Executors v. *Fauché*, 138 U. S. 562.
Heinze v. *Arthur's Executors*, 144 U. S. 28.
Re Houdlette, 48 Fed. Rep. 545.
Frazee v. *Moffitt*, 18 Fed. Rep. 585.
Arthur v. *Dodge*, 11 Otto, 34.

The case of *Davies* v. *Arthur*, 6 Otto, 148, relied upon by the district attorney in the court below, and perhaps to be cited in the brief of the Government in this court is not in point; in that case the importer attempted to change both the classification and the rate which he had given as the correct one to the collector by his protest, so that the collector was not informed at all by the protest of the grounds upon which the importer claimed the assessment to be improper.

It is evident from an inspection of the declaration and the whole record that the superfluous recitation in the statement of facts on page 4, that the plaintiffs brought this suit to recover the sum of $119 is an error, as it appears by the declaration that their claim was $238. A superfluous recitation, which appears from the rest of the record itself to be an error, should not certainly after judgment in the court below prevent a recovery of the full amount claimed.

The result is that the judgment should be affirmed.

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